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700 13th Street, NW
Suite 600
Washington, DC 20005-3960+1 202.654.6200
+1 202.654.6211
perkinscoie.com

May 18, 2015

Marc Erik Elias
MElias@perkinscoie.com
D. (202) 434-1609
F. (202) 654-9126Frankie Hampton, Paralegal
Federal Election Commission
Office of Complaints Examination
and Legal Administration
999 E Street, NW
Washington, DC 20436**Re: Response to Complaint, MUR 6924**

Dear Ms. Hampton:

On behalf of Friends of Mazie Hirono, and Carol Puette, in her official capacity as treasurer, this letter responds to the complaint received by the Federal Election Commission ("FEC") on March 17, 2015.

The complaint alleges that certain communications distributed by Pacific Resource Partnership ("PRP") were "coordinated communications" with Friends of Mazie Hirono (the "Committee"), Senator Hirono's authorized campaign committee. But the complaint does not allege facts that support such a charge. The complaint rests on an allegation that Andrew Winer was acting as a "common vendor" between PRP and the Committee. But that is simply incorrect. Mr. Winer did not receive compensation from the Committee and, therefore, cannot be a "common vendor" under the FEC's regulations. In addition, the complaint does not allege any facts suggesting that Mr. Winer was acting as an "agent" of the Committee in performing work for PRP and, in his declaration, Mr. Winer specifically denies doing so. Because the complaint does not allege facts that, if proven true, would constitute a violation of the Federal Election Campaign Act (the "Act") or FEC regulations, the FEC should dismiss the complaint and close the file.

BACKGROUND

Senator Mazie Hirono successfully ran for U.S. Senate during the 2012 election. During that election cycle, Andrew Winer volunteered his services to the Committee.¹ Mr. Winer was not paid by the campaign for his services, which, during the general election, focused primarily on debate preparation.² In his volunteer capacity for the Committee, Mr. Winer did not have actual authority, express or implied, to engage in any of the activities described in 11 C.F.R. § 109.3(b).³

During the 2012 election cycle, according to published reports, Mr. Winer was also employed by

¹ Declaration of Andrew Winer ¶ 2 (May 14, 2015), ("Winer Decl."), attached hereto as Attachment A

² *Id.* ¶¶ 2, 5.

³ *Id.* ¶ 3.

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Pacific Resource Partnership ("PRP") as a consultant.⁴ In his declaration, Mr. Winer states that he helped PRP with message strategy related to Honolulu's nonpartisan mayoral election.⁵ According to reports filed with the FEC, in October and November 2012, PRP reported making independent expenditures in support of Senator Hirono.

Mr. Winer's volunteer work for the Committee was unrelated to his work for PRP.⁶ Senator Hirono did not endorse a candidate in the nonpartisan mayoral race and Mr. Winer did not tell any employee or agent of the Committee about the PRP communications at issue in this matter prior to their being distributed to voters by PRP.⁷ Additionally, according to Mr. Winer, he did not use information about the plans, projects, activities, or needs of the Committee, or information used previously in providing services to the Committee, in his work for PRP.⁸ Nor did he convey such information to PRP.⁹ Moreover, Mr. Winer represents that any information he learned in his work for the Committee would not have been material to PRP's communications.¹⁰

LEGAL DISCUSSION

The Commission may find "reason to believe" that a violation has occurred only "if a complaint sets forth sufficient facts, which, if proven true, would constitute a violation of the [Act]."¹¹ This complaint fails to marshal facts that, if proven true, would establish a coordinated communication between PRP and the Committee. The complaint contends that "an investigation would support the finding that 11 C.F.R. § 109-1, et seq. was violated in the three conditions of what is a coordinated communication."¹² But the law "does not permit a complainant to present mere allegations that the Act has been violated and request that the Commission undertake an investigation to determine whether there are facts to support these charges."¹³ And, as explained below, the facts before the Commission establish that no coordinated communication took place.

A "coordinated communication" occurs only where three prongs are met.¹⁴ First, the public communication must be paid for by a person other than the candidate, authorized committee, or political party committee with which it was coordinated. Second, it must satisfy one or more

⁴ See *id.* ¶ 4.

⁵ *Id.*

⁶ *Id.* ¶ 5.

⁷ See *id.* ¶ 8.

⁸ *Id.* ¶ 6.

⁹ *Id.* ¶ 7.

¹⁰ *Id.* ¶¶ 6-7.

¹¹ Statement of Reasons of Comm'rs David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas, MUR 4960 (Dec. 21, 2000).

¹² Compl. at 5.

¹³ Statement of Reasons of Vice Chairman Matthew S. Petersen and Comm'rs Caroline C. Hunter and Donald F. McGahn, MUR 6056, at 6 n.12 (June 2, 2009).

¹⁴ 11 C.F.R. § 109.21(a).

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content standards. Third, it must satisfy one of the prescribed conduct standards. Here, the conduct prong was not satisfied between the Committee and PRP.

I. The "Common Vendor" Standard Was Not Met

The complaint suggests that PRP and the Committee shared a "common vendor" and thereby satisfied the "conduct prong." This is factually incorrect. Mr. Winer was not a "common vendor" between the Committee and PRP. To be a "common vendor" between two entities, one must serve as a "commercial vendor" to both entities.¹⁵ A "commercial vendor" means any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services.¹⁶ Mr. Winer was an uncompensated volunteer for the Committee and therefore was not acting as a "commercial vendor."¹⁷

Additionally, even if Mr. Winer were paid by the Committee to provide consulting services, the "common vendor" prong still would not have been satisfied. The "common vendor" prong is *not* satisfied merely because a campaign committee and a third party group use the same consultant. It is met only where the shared vendor "uses or conveys to the person paying for the communication: (A) [i]nformation about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or (B) [i]nformation used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication."¹⁸ The Commission has underscored that "vendors who provide one or more of the specified services are not in any way prohibited from providing services to both candidates or political party committees and third-party spenders" and that the Commission "does not presume coordination from the mere presence of a common vendor."¹⁹

Instead, the "regulation focuses on the sharing of information about plans, projects, activities, or needs of a candidate or political party through a common vendor to the spender who pays for a communication that could not then be considered to be made 'totally independently' from the candidate or political party committee."²⁰ The complaint does not allege that Mr. Winer used or shared such information. Indeed, Mr. Winer specifically denies that he did so. Mr. Winer

¹⁵ *Id.* § 109.21(d)(4)(i)-(ii).

¹⁶ *Id.* §§ 109.21(d)(4)(i), 116.1(c).

¹⁷ Winer Decl. ¶¶ 2, 5.

¹⁸ 11 C.F.R. § 109.21(d)(4)(iii).

¹⁹ See Coordinated and Indep. Expenditures, 68 Fed. Reg. 421, 436-37 (Jan. 3, 2003); see also First General Counsel's Report, MUR 6050, at 9 (Jan. 23, 2009).

²⁰ Coordinated and Indep. Expenditures, 68 Fed. Reg. at 436.

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represents in his sworn declaration that he did not use in his work for PRP, or convey to PRP, information about the plans, projects, activities, or needs of the Committee or information used previously in providing services to the Committee. Further, according to Mr. Winer, such information would not have been material to PRP's communications anyhow because Mr. Winer's work for PRP was related to message strategy related to Honolulu's nonpartisan mayoral election.

Moreover, the regulations are clear that a campaign does not accept an in-kind contribution for a coordinated communication pursuant to the common vendor prong unless the "request or suggestion," "material involvement," or the "substantial discussion" standards of the conduct prong are also met with respect to the communication.²¹ As detailed in Part II below, these standards are not met in this case. Therefore, the common vendor standard cannot be met with respect to the Committee.

II. No Other Conduct Standard Was Met

Nor are any of the other conduct standards met here. Mr. Winer was not an "agent" of the Committee. A person is an "agent" of a candidate only where he "[r]eceives actual authorization, either express or implied, from a specific principal to engage in the specific activities listed in [section] 109.3."²² As Mr. Winer attests in his declaration, he received no such authority from the Committee. His role with the campaign was primarily limited to assisting with debate preparation; that simply does not rise to the level of being an "agent" of the campaign for purposes of the coordination rules.

And even if Mr. Winer were an "agent" of the Committee, his work for PRP was not undertaken on behalf, or on the authority, of the campaign. The Commission has stated unequivocally that "a person would only qualify as an 'agent' when he or she ... engages in those activities *on behalf of that specific principal*."²³ Conversely, a "principal would not assume 'liability' for agents who act outside the scope of their actual authority, nor would a person be considered an 'agent' of a candidate if that person approaches an outside spender on behalf of a different organization or person."²⁴ Mr. Winer was not acting as the campaign's agent while performing work for PRP. As noted earlier, then-Congresswoman Hirono did not endorse a candidate in the Honolulu mayoral race and Mr. Winer's work for PRP long pre-dated his volunteer activity for the campaign in the general election. Additionally, Mr. Winer did not tell any employee or agent of the Committee about the PRP communications at issue in this matter prior to their being distributed to voters by PRP.

Thus, the "request or suggestion" and "material involvement" standards are not met.

²¹ 11 C.F.R. § 109.21(b)(2).

²² Coordinated and Indep. Expenditures, 68 Fed. Reg. at 424.

²³ *Id.* (emphasis added).

²⁴ *Id.*

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Additionally, the "substantial discussion" standard is not met because the Committee's plans, projects, activities, or needs were not conveyed to PRP and, in any event, were not material to any of the PRP communications at issue here. Accordingly, none of the conduct standards are met to establish a coordinated communication between the Committee and PRP.

For the reasons set forth above, the Commission should dismiss the complaint and close the file.

Very truly yours,



Marc E. Elias
Jonathan S. Berkon
Rachel L. Jacobs

Counsel to Friends of Mazie Hirono and Carol Puette, in her official capacity as treasurer